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Nancy Kual v Ho Thau On

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K20 OF 1992

SYED AHMAD IDID J

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29 JULY 1993

Family Law — Marriage — Customary marriage — One party a native of Sabah and the other party a non-native — Marriage not registered in accordance with the provisions of the Law Reform (Marriage and Divorce) Act 1976 — Whether marriage valid and subsisting in law — Law Reform (Marriage and Divorce) Act 1976 ss 3(1) & 5(4)

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The plaintiff, a native of Sabah and the defendant, a Chinese, underwent a tea ceremony to celebrate their marriage according to Chinese customs, on 5 May 1990. The plaintiff and defendant thereafter cohabited as wife and husband. On 24 June 1990, the plaintiff and the defendant underwent another celebration of their marriage, this time according to the customs of the Kadazan Tatana. The plaintiff and the defendant continued to cohabit until they experienced domestic problems. The defendant then left the matrimonial home. What then followed were meetings between the plaintiff and the defendant with the native court. At one meeting, the defendant, on being shown photographs of the marriage, replied, 'Itu main-main sahaja' ('That was merely a playful thing').

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The plaintiff is seeking a declaration that she is the legal wife of the defendant and that the native customary marriage entered into between them on 24 June 1990 was valid and subsisting in law. The issue was whether, in view of s 5(4) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') read with s 3(1) thereof, a marriage solemnized under native customary law and not registered in accordance with the provisions of the Act between a non-native (the defendant) and a native (the plaintiff) was valid.

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Held, granting the order applied for by the plaintiff and declaring that she is the legal wife of the defendant:

(1) The order which the court made was based on the humanitarian grounds of supporting the relationship of husband and wife and discouraging any party from treating weddings and marriage rituals lightly.

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(2) Although one of the parties here is a non-native, the court was of the opinion that the marriage which both the defendant and plaintiff went through, according to the Kadazan Tatana custom, is to be recognized as valid, parallel to s 104, though that section speaks of 'marriage contracted outside Malaysia'. The present marriage was contracted in a form required or permitted by the law of the country where it was contracted, ie according to the native customary law in Sabah.

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Per curiam:

It would have assisted greatly if the Act had, in s 4, added: 'Nothing in this Act shall affect the validity of any marriage solemnized according to native customary law prior to or after the appointed date.' This case would have been taken care of if the Act had added those magic words.

[Bahasa Malaysia summary]

Plaintif, seorang anak watan Sabah dan defendan, yang berbangsa Cina, telah menjalani suatu upacara minum teh untuk meraikan perkahwinan mereka menurut adat kaum Cina pada 5 Mei 1990. Selepas itu, plaintif dan defendan telah bersekedudukan sebagai suami isteri. Pada 24 Jun 1990, plaintif dan defendan telah menjalani satu lagi perayaan perkahwinan mereka, kali ini menurut adat Kadazan Tatana. Plaintif dan defendan terus bersekedudukan sehingga mereka mengalami masalah domestik. Defendan kemudiannya telah meninggalkan kediaman suami isteri. Apa yang berikutan adalah perjumpaan di antara plaintif dan defendan bersama dengan mahkamah adat. Di dalam suatu perjumpaan tersebut, defendan setelah ditunjuk gambar-gambar perkahwinan, telah menyatakan bahawa, 'Itu main-main sahaja'.

Plaintif sekarang menuntut suatu deklarasi bahawa beliau merupakan isteri defendan yang sah dan bahawa perkahwinan mereka yang telah diupacarakan di bawah adat anak watan pada 24 Jun 1990 itu, adalah sah dan wujud di sisi undang-undang. Isu di dalam kes ini adalah sama ada, memandangkan s 5(4) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu') dibaca bersama s 3(1) Akta itu, suatu perkahwinan yang telah diupacarakan di bawah undang-undang adat anak watan dan tidak didaftarkan menurut peruntukan Akta itu di antara seorang bukan anak watan (defendan) dan seorang anak watan (plaintif) adalah sah.

Diputuskan, membenarkan perintah yang dipohon oleh plaintif dan mengisytiharkan bahawa plaintif merupakan isteri defendan yang sah:

- (1) Perintah yang dibuat oleh mahkamah adalah berdasarkan alasan-alasan perikemanusiaan untuk menyokong perhubungan di antara suami isteri dan tidak menggalakkan sesebuah pihak daripada menganggap ringan upacara dan upacara amal perkahwinan.
- (2) Walaupun satu pihak kepada kes ini merupakan seorang bukan anak watan, mahkamah berpendapat bahawa perkahwinan yang dijalani oleh plaintif dan defendan, menurut adat Kadazan Tatana, akan diiktirafkan sebagai sah, serupa dengan s 104, walaupun seksyen itu adalah berkenaan dengan 'perkahwinan yang dilakukan di luar Malaysia'. Perkahwinan di dalam kes ini diadakan dalam bentuk yang diperlukan atau diperuntukkan oleh undang-undang negara di mana ia dilakukan, iaitu menurut undang-undang adat anak watan di Sabah.

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Per curiam:

Adalah menjadi bantuan besar jika Akta itu, pada s 4, menambah: 'Tidak apa-apa jua dalam Akta ini yang akan menyentuh sahnyanya sesuatu perkahwinan yang telah diupacarakan menurut undang-undang adat anak watan sebelum atau selepas tarikh yang ditetapkan.' Kes ini akan diselesaikan jika Akta itu mengandungi kata-kata sakti itu.]

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Cases referred to

1 *Abdul Razak v Lisia bte Mandagie @ Maria Menando* Syariah Court Case No 42 of 1964 (refd)

2 *Sugumar v Kui Chin* [1984] 2 MLJ 63 (refd)

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3 *Lindo v Belisario* (1795) 1 Hag Con 216 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 5(3), (4), 104(a)

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Yee Pui Phing (Skinner, Lind, Robertson, Willie, Wong & Chin) for the plaintiff.

Marina Tiu (Yap Chin & Tiu) for the defendant.

Syed Ahmad Idid J: The plaintiff seeks a declaration that she is the legal wife of the defendant and that the native customary marriage entered into between them on 24 June 1990 is valid and subsisting in law.

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The plaintiff, born in 1963, is a Kadazan Tatana and so is a native of Sabah. 'Native' is defined by s 2(1)(a) of the Interpretation (Definition of Native) Ordinance 1952 which at the beginning was applicable to the colony of North Borneo which is now Sabah.

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The defendant was born in 1961 at Beaufort of Chinese parents.

Facts

On 5 May 1990, the plaintiff and the defendant underwent a tea ceremony held to celebrate the marriage between them according to Chinese customs. The defendant's parents, brothers and sister-in-law and the plaintiff's father and brother attended. Coloured photographs were taken of those who attended and of the plaintiff and defendant in bridal dress/suit and tendered as exhibits. The plaintiff served tea at the ceremony.

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The plaintiff and the defendant thereafter cohabited as wife and husband.

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On 24 June 1990, the plaintiff and the defendant underwent another celebration of their marriage, this time according to the adat istiadat (customs) of the Kadazan Tatana at plaintiff's father's residence. During this occasion, which the plaintiff described as a 'native marriage', the plaintiff and the defendant served tapai (rice wine) to the Ketua Anak Negeri (Native Chief) of Kuala Penyu, who witnessed the marriage, and all the elders.

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The plaintiff and the defendant continued to cohabit until they experienced domestic problems. The defendant then left the matrimonial home in August 1990 for a few days. The defendant again left the plaintiff

in January 1991 when the plaintiff was expecting a child. He returned in April but left again in June 1991 and has not returned to the plaintiff since.

What then followed were meetings between the plaintiff and the defendant with the native court. At one meeting, the defendant, on being shown the photographs of the marriage, replied, 'Itu main-main sahaja' ('That was merely a playful thing').

The plaintiff and the defendant did not register their marriage under the Law Reform (Marriage and Divorce) Act 1976 ('the Act').

The Ketua Anak Negeri of Kuala Penyu on 9 December 1991 certified that both 'Encik Ho (defendant) and Puan Nancy Kual (plaintiff) telah melangsungkan perkahwinan pada 24 June 1990 mengikut adat istiadat Kadazan Tatana' and 'accordingly they are certified as husband and wife'.

I need not go into the other problems which the plaintiff encountered with the defendant, eg of the misuse of credit cards, of the pregnancy test, of the plaintiff's meeting with the defendant's mother, and of the police report on the defendant's disappearance.

The *issue* is: Whether, in view of s 5(4) of the Act read with s 3(1) thereof, a marriage solemnized under native customary law and not registered in accordance with the provisions of the Act between a non-native (the defendant) and a native (the plaintiff) is valid.

Ms Yee Pui Phing, counsel for the plaintiff, contends that the marriage is valid despite its non-registration. She quotes s 3(4) that the Act does not apply to any native of Sabah and the plaintiff is a native. But the defendant is not. Hence the difficulty that both counsel meet in their attempt to resolve the claim. Unfortunately, this point has not been raised nor decided before. The defendant, in his defence, merely states that he is '... by race, a pure Chinese'.

Social impact on the community

The court was told that there are many couples in similar circumstances in Sabah. They participated in the ceremonies and rituals but did not register. The following situations spring to mind:

- (a) A muslim marrying another Muslim. In such a case, their marriage must be governed by the Syariah Law (s 3(3)) notwithstanding that one is or both are natives. For the present reckoning, there is no such liaison as that of a non-Muslim marrying a Muslim for the purpose of our discussion. This is due to the fact that before a non-Muslim can marry a Muslim he or she must first embrace Islam. Then as a Muslim, he or she is permitted to go through the marriage ceremony which is solemnized by a Kadi. See the article on 'Marriages of Muslims with Non-Muslims' [1965] 1 MLJ xvi which discusses the case of *Abdul Razak v Lisia bte Mandagie @ Maria Menando*.¹
- (b) A non-Muslim native marrying another non-Muslim native — if their marriage is governed by the native customary law, then the Act does not apply (s 3(4)). The law does not, it seems to me, prohibit a native of any religion (except Islam) from marrying another native of the same

A or any other religion (except Islam) or from contracting a marriage under the native customary law.

(c) A native marrying a non-native who may be a Malaysian or a foreigner.

The third scenario describes the case today as the plaintiff is a native and the defendant, though a Malaysian, is not a native.

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The law after 1 March 1982 in Sabah

The Act provides for monogamous marriages for non-Muslims. By s 5(4), no marriage, after 1 March 1982, under any law, religion, custom or usage may be solemnized except as provided in Pt III which deals with restrictions on marriages, preliminaries and solemnization of marriages. By Pt IV s 27, the marriage of every person ordinarily resident in Malaysia and of a person resident abroad who is a citizen or domiciled in Malaysia shall be registered pursuant to the Act. The 'marriage' in our instant case has not been so registered.

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While the plaintiff is clearly a native, the Act can only be taken as not applying to her if the court accepts that her 'marriage is governed by native customary law'. There is no difficulty if both she and the defendant are natives but sadly this is not the case. Section 3(4) of the Act seems to put a question mark on the defendant's role and capacity as he is a non-native.

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According to Ms Marina Tiu, counsel for the defendant, the defendant's part in the ceremony makes the marriage void as the word 'race' in s 5(3) of the Native Courts Ordinance or s 6(3) of the Native Courts Enactment 1992 ('the 1992 Enactment') refers to the sub-groups within the natives and not race as referring to Chinese, Malays and others. But see *Sugumar v Kui Chin*.² Even if I accept this argument (which seems to be on good grounds if we read art 161A(7) of the Federal Constitution which is in respect of Sarawak), it seems to me the matter is still caught by s 6(1)(c) of the 1992 Enactment.

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I am somewhat curious of the intent of s 5(3) of the Act which states:

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Every person who on the appointed date is unmarried and who *after that date* marries under any law, religion, custom or usage shall be incapable during the continuance of such marriage of contracting a valid marriage with any other person under any law, religion, custom or usage whether the first mentioned marriage or the purported second mentioned marriage is contracted within Malaysia or outside Malaysia. (Emphasis added.)

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It appears to imply that the Act 'accepts' a marriage performed under 'any law, religion, custom or usage' *'after that date'* (which, for Sabah, is after 1 March 1982). It can apply to both the plaintiff and the defendant, notwithstanding any decision of this court today, 'during the continuance of such marriage' unless their marriage is void in contravention of s 5(4).

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Then sub-s (4) says:

After the appointed date, no marriage under any law, religion, custom or usage may be solemnised except as provided in Part III.

Ceremony and rituals

I am of the opinion that the marriage in today's case cannot be declared as valid and subsisting if based only on the form of ceremony and rituals which the parties underwent according to Chinese customs on 5 May 1990. While the Act does not prohibit the observance of the old Chinese customs and rituals from continuing, the Act however recognizes the marriage as valid only when its registration follows in the manner so provided. This is due to the fact that the law has been changed from March 1979 for Peninsular Malaysia and from March 1982 as for Sabah. By s 5(4), after the appointed dates, no marriage under any law, religion, custom or usage may be solemnized. In my opinion 'under any law' means either 'under any law except this' or 'under any other law'. If the marriage is so solemnized in contravention of the Act, it is by s 6, *void*.

Historical

The Act was based on the recommendations of the Royal Commission which studied and examined the prevailing laws relating to marriage and divorce (other than Muslim marriages). It considered the representations from various racial and religious groups. The Bill was originally introduced in the Dewan Rakyat in December 1972 but was referred to a Joint Select Committee which caused the original Bill to be redrafted. See article on 'The Law Reform (Marriage and Divorce) Bill 1972' [1973] 1 MLJ vii.

Subject to the provision of s 75(2) of the Act, any child of a void marriage is treated as a legitimate child of his parents if, at the time of the solemnization of the marriage, both or either of the parties reasonably believed that the marriage was valid. I do not have to determine this as the union between plaintiff and the defendant has sadly led to her miscarriage.

Support for the institution of marriages

The order which I shall make is based on the humanitarian grounds of supporting the relationship of husband and wife and discouraging any party from treating weddings and marriage rituals lightly. Sex can be enjoyed in the confines of a home recognized by both law and religion as one which engenders goodwill. To allow otherwise would encourage sea-gulls, ie persons from outside who swoop into Sabah or another community, to savour sex and then exit with no liability whatsoever. It so happens the native today is a female. Next time it may be the reverse. But the law is the same: he who contracts a marriage must take it seriously. Whatever the law may say, a marriage is held by some persons as a civil contract and by others that it is sacred, religious and spiritual. As Sir William Scott in *Lindo v Belisario*³ said:

If they agree and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete.

- A Or to quote the maxim of the Roman Civil Law, '*Consensus non concubitus facit matrimonium*'.

Whether the Act accepts the native customary marriage

- B I will now proceed to the marriage according to native customary law of Sabah. Can it be valid or should the court rule it as void? Section 3(4) says that the Act does not apply to natives of Sabah whose marriages and divorces are governed by native customary law, and the plaintiff's marriage was so governed. Should the fact that the defendant is not a native matter? I should think not. He decided to marry a native and observed the rites and customs of the woman. He cannot make tracks and then retract. Section 6(1)(b) of the 1992 Enactment (which is similarly worded as in s 5(1)(b) of the Native Courts Ordinance (No 6 of 1953) ('the 1953 Ordinance') ('now repealed) provides that the native court can exercise jurisdiction to hear, try, determine and dispose of cases arising from breach of native law or custom, religious, *matrimonial* or sexual ... where one party is a *non-native* (s 6(1)(b) of the 1992 Enactment) or where one party is a *native* (s 5(1)(b) of the 1953 Ordinance). The legislators seem unsure when they use the words non-native and native. Either description seems to be immaterial in this context. One can say the glass is half-full or half-empty. Perhaps in an appropriate case where there may be more than two parties, one or the other of the descriptions may change the course of arguments but not so in today's case.
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Coming back to the question of the applicability of the 1992 Enactment/ 1953 Ordinance, it would have assisted greatly if the Act had, in s 4, added: 'Nothing in this Act shall affect the validity of any marriage solemnized according to native customary law prior to or after the appointed date.'

- F The circumstances of this case would have been taken care of if the Act had added those magic words. It does, however, say, albeit in an oblique way, that marriages by native customary laws are recognized (see s 3(4)). Although one of the parties here is a non-native, I am of the opinion that the marriage which both the defendant and plaintiff went through according to the Kadazan Tatana custom is to be recognized as valid, parallel to s 104, though that section speaks of 'marriage contracted outside Malaysia'. I am of the opinion that the marriage in our case 'shall be recognised as valid for all purposes of the law of Malaysia' (s 104(a)). This conclusion is based on my belief that the present 'marriage was contracted in a form required or permitted by the law of the country where it was contracted', ie according to the native customary law here in Sabah. When the defendant appeared at the native court, he did not challenge the jurisdiction then and neither had his counsel challenged this before our court. I therefore accept the certificate of the native chief at NK4. Furthermore, a fortiori because the marriage in question was contracted in Malaysia it should add strength to my belief that it can be recognized as a valid marriage. On these grounds,
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- I I now grant the order applied for by the plaintiff and declare that she is the legal wife of the defendant and that her marriage on 24 June 1990 is valid and subsisting. To allow the defendant to rid himself of his responsibility

after going through the ceremony and the rites and rituals of both the Chinese and Kadazan customs will be to encourage the vandalism of a woman, a little short of cannibalism both of which must be eradicated in all forms and at all stages. Order accordingly.

It seems to me that the registration of every marriage solemnized according to native customary law by a central body in each state and district can help obviate uncertainty. The legislators may now wish to improve on the Act and the 1992 Enactment in this respect with the view of assisting present and future marriages. This can give equality and dignity to all who are affected.

Order accordingly.

Reported by Jeanne Tan

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